No. 78-1261

In the Supreme Court of the United States

OCTOBER TERM, 1978

NORMAN A. CARLSON, DIRECTOR
FEDERAL BUREAU OF PRISONS, ET AL., PETITIONERS

v.

MARIE GREEN, ADMINISTRATRIX OF THE
ESTATE OF JOSEPH JONES, JR.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The Solicitor General, on behalf of Norman A. Carlson, Director, Federal Bureau of Prisons, and the other federal defendants,[1] petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

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[1] The other federal defendants include the Assistant Surgeon General, the Chief Medical Officer of the Terre Haute Penitentiary and two staff officials at the Terre Haute Penitentiary infirmary. The warden of the Penitentiary also was named in the original complaint but was never served, and he is not a party to this case (App. A, *infra*, 16a n.12).

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-17a) is reported at 581 F.2d 669. The opinion of the district court (App. D, *infra*, 22a-27a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 18a-19a) was entered on August 3, 1978. A timely petition for rehearing was denied on November 24, 1978 (App. C, *infra*, 20a-21a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in circumstances in which the Federal Tort Claims Act provides an adequate federal remedy, an alternative remedy should be found to be implied under the Eighth Amendment.

2. Whether, if the Eighth Amendment creates such a right, survival of that action is governed by federal common law rather than the state statutes that apply to analogous cases.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

2. The Eighth Amendment to the United States Constitution provides in relevant part:

> [C]ruel and unusual punishments [shall not be] inflicted.

3. 28 U.S.C. 1346(b) provides in relevant part:

> [T]he district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

4. 28 U.S.C. 2674 provides:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.
>
> If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

5. 28 U.S.C. 2680(h) provides:

> The provisions of this chapter and section 1346 (b) of this title shall not apply to—
>
> * * * * *
>
> Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

STATEMENT

Joseph Jones, Jr., died in the federal penitentiary in Terre Haute, Indiana, while serving 10 years' imprisonment for bank robbery. Alleging that her son's death was the result of deliberate indifference to his medical needs in violation of the Fifth and Eighth Amendments to the Constitution, respondent, as administratrix of her son's estate and next-of-kin, brought this suit seeking money damages.

1. Respondent's complaint alleges the following facts.[2] On his entry into the federal prison system in 1972, Jones was diagnosed as a chronic asthmatic. Jones arrived at Terre Haute in July 1974. Between July 30 and August 6, 1975, he was hospitalized outside the prison for his asthmatic condition. The attending physician recommended that Jones be transferred to a prison in a better climate and also prescribed certain medication for Jones. Jones remained in Terre Haute and did not receive the medication that had been prescribed.

On August 15, 1975, Jones complained of another asthma attack and was admitted to the prison hospital.[3] Jones remained there for eight hours, sporadically attended by petitioner William Walters, an unlicensed nurse in charge of the infirmary. Despite Jones's steadily worsening condition, no doctor examined him because none was on duty and none was called in.[4] After tending to his other duties, Walters eventually attempted to treat Jones with a respirator that Walters had been told was not functioning properly. When Jones pulled away from the machine and complained that his breathing was worse, Wal-

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[2] In the current procedural posture of the case, we accept as true the factual allegations of the complaint, which are summarized by the court of appeals (App. A, *infra*, 2a-4a).

[3] The complaint states that this attack occurred on August 14, 1975.

[4] The complaint alleges that petitioner Benjamin De Garcia, the chief medical officer of the prison, had failed to make any provisions for emergency medical service.

ters gave Jones two injections of Thorazine, a drug that should not be used for treatment of asthma. About thirty minutes after the second injection, Jones suffered a respiratory arrest. Walters and petitioner Emmett Barry then attempted to revive Jones by administering an electric jolt to him, but neither Walters nor Barry knew how to operate the emergency machine. Jones later was taken to the local hospital and pronounced dead on arrival.

2. On June 18, 1976, respondent filed this suit in the United States District Court for the Southern District of Indiana, claiming that the acts summarized above caused the death of her son and constituted gross and intentional medical maltreatment in violation of the Fifth and Eighth Amendments. Respondent alleged that jurisdiction existed under 28 U.S.C. 1331 and sought $1,500,000 compensatory and $500,000 punitive damages.

In January 1977 the district court dismissed the action on jurisdictional grounds.[5] The court first concluded that a damages action for constitutional violations is available under the rationale of this Court's decision in *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), and that respondent had alleged sufficiently a violation of her son's Eighth Amendment rights (App. D, *infra*, 25a-26a). See *Estelle* v. *Gamble*, 429 U.S. 97 (1976). The court held, however, that because under Indiana law respondent's

[5] The court also found that three of the six federal defendants have been improperly served and therefore dismissed the action against them on this alternative ground (App. D, *infra*, 23a-24a).

recovery was limited to "reasonable hospital, medical, and burial expenses, * * * it is apparent that [respondent] cannot 'in good faith' satisfy the [$10,000] jurisdictional amount requirement" of 28 U.S.C. 1331 (App. D, *infra*, 27a).[6]

The court of appeals reversed in substantial part.[7] The court agreed with the district judge that respondent had alleged sufficiently a *Bivens*-type right of recovery arising under the Eighth Amendment. The court refused, however, to apply the Indiana survival and wrongful death provisions to this case. The court concluded that "whenever the relevant state survival statute would abate a *Bivens*-type action brought

[6] The Indiana Civil Code provides that "[a]ll causes of action shall survive * * * except actions for personal injuries to the deceased party, which shall survive only to the extent provided herein." Ind. Code ¶ 34-1-1-1 (1971). Where the injured person "dies from causes other than said personal injuries so received," then the deceased's representative may recover "only the reasonable medical, hospital and nursing expense and loss of income of said injured person, resulting from such injury, from the date of the injury to the date of his death." *Ibid.* But if the injury causes the death of the injured party, the decedent's representative usually may recover unlimited damages (*i.e.*, including pain and suffering and lifetime earnings), except where, as here, the decedent leaves no spouse, dependent children or dependent kin. Ind. Code ¶ 34-1-1-2 (1971). In the latter circumstance, the representative may recover only medical, hospital, burial and administration expenses. *Ibid.* Jones had no wife, children or dependent kin, and his medical, hospital, and funeral expenses were paid by the federal government.

[7] The court of appeals affirmed the dismissal of this action with regard to one of the federal defendants whom respondent failed to serve at all. See note 1, *supra*.

against defendants whose conduct results in death, the federal common law allows survival of the action" (App. A, *infra*, 13a). The court recognized that the Indiana rule would not thwart any interest of Jones, but it concluded that the rule would "subvert" the "policy of allowing complete vindication of constitutional rights" by making it "more advantageous for a tortfeasor to kill rather than to injure" (*id.* at 12a).

REASONS FOR GRANTING THE PETITION

1. This case presents important questions concerning the scope and application of the principles announced in *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971). The court of appeals has held that the Eighth Amendment gives respondent a right to seek money damages from federal officials, even though no statute creates such a right of action and even though the Federal Tort Claims Act ("FTCA"), 28 U.S.C. 1346(b), 2671 *et seq.*, provides an adequate federal remedy for respondent's claims on behalf of her son's estate. The court's implication of a *Bivens*-type constitutional right of action to supplement or replace a comprehensive statutory remedy not only ignores the analysis used by this Court in *Bivens* and subsequent cases but also squarely conflicts with several decisions of the lower federal courts. In light of these conflicts, and because this Court is considering a closely related issue in *Davis* v. *Passman*, 571 F.2d 793 (5th Cir. 1978) (*en banc*), cert. granted, No. 78-5072 (Oct. 30, 1978), the Court should grant review here.

a. In *Bivens* the Court established that the victims of a violation of the Fourth Amendment by a federal agent has a right to recover damages in federal court despite the absence of any statute conferring such a right. Consistent with its approach in other "implied right of action" cases,[8] the Court examined the nature of the substantive right in question, the scope of federal remedies available, whether the substantive right was appropriately adjudicated in federal court, and whether there were "special factors counselling hesitation in the absence of affirmative action by Congress" (403 U.S. at 396). The Court concluded that the substantive right in question was preeminently federal in nature, that the availability of damages would encourage obedience to the constitutional norm, and that Congress had not indicated in any way that a damages remedy would be inappropriate.[9] The

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[8] See, *e.g.*, *Cort* v. *Ash*, 422 U.S. 66, 78 (1975). The standards under which the Court should recognize rights of action in the absence of explicit statutory authorization are extensively discussed in three briefs that the government has filed in cases now before the Court. See *Chrysler Corp.* v. *Brown*, No. 77-922, argued (Nov. 8, 1978); *Cannon* v. *University of Chicago*, No. 77-926, argued (Jan. 9, 1979); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, No. 77-1645, cert. granted (Nov. 6, 1978). We have furnished copies of our briefs in these cases to counsel for respondent.

[9] Another relevant inquiry may be whether "courts of law are capable of making the types of judgment concerning causation and magnitude of injury necessary to accord meaningful compensation for [the particular constitutional violation]." *Bivens*, *supra*, 403 U.S. at 409 (Harlan, J., concurring). See *Carey* v. *Piphus*, 435 U.S. 247 (1978).

Court remarked, however, that the existence of "another [federal] remedy, equally effective in the view of Congress," *id.* at 397, might well be a "special factor[]" militating against the implication of a constitutional damages action. Justice Harlan, who concurred in the judgment, also remarked that "[h]owever desirable a direct remedy against the Government might be as a substitute for individual official liability," until such time as the sovereign waives its immunity "[f]or people in Bivens' shoes, it is damages or nothing" (*id.* at 410).

The Court thus recognized that the implication of a constitutional damages action might well be inappropriate where Congress has provided another adequate remedy. Consistent with this recognition, the Court later held that the existence of a statutory remedy for government employees in employment discrimination cases precluded resort not only to other possible statutory remedies but also to a *Bivens*-type action under 28 U.S.C. 1331. *Brown* v. *General Services Administration*, 425 U.S. 820, 823-824, 834-835 (1976) (construing Section 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16). It is therefore of considerable importance, in deciding whether to recognize federal rights of action for "constitutional torts," to analyze all of the statutes that either supply a remedy or indicate what the remedy should be.

Several courts of appeals, following the analysis set forth in *Bivens* and *Brown*, have refused to find a remedy implied directly from the Constitution for use

by plaintiffs whose injuries could be redressed under existing federal statutes. *Turpin* v. *Mailet*, No. 77-7345 (2d Cir. Jan. 16, 1979) (*en banc*) (rejecting extension of *Bivens* following remand by this Court to reconsider prior decision in light of *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978)); *Molina* v. *Richardson*, 578 F.2d 846, 850-853 (9th Cir. 1978) (*Bivens* not applicable in light of existing remedy under 42 U.S.C. 1983); *Richardson* v. *Wiley*, 569 F.2d 140 (D.C. Cir. 1977) (Title VII precludes *Bivens*-type remedy); *Mahone* v. *Waddle*, 564 F.2d 1018, 1024-1025 (3d Cir. 1977) (existence of 42 U.S.C. 1981 militates against extension of *Bivens*). And two federal district courts have rejected the result the Seventh Circuit reached here. These courts hold that prisoners who could seek relief under the FTCA may not seek damages directly from federal officials under an implied constitutional right of action. See *Torres* v. *Taylor*, 456 F. Supp. 951 (S.D. N.Y. 1978); *Hernandez* v. *Lattimore*, 454 F. Supp. 763 (S.D. N.Y. 1978), appeal pending, No. 78-2098 (2d Cir.). Contra, *Loe* v. *Armistead*, 582 F.2d 1291 (4th Cir. 1978).[10] Because the FTCA provides an adequate remedy for prisoners who are harmed by improper medical care,[11] the instant decision conflicts with these cases.

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[10] A petition for a writ of certiorari is also being filed on behalf of the federal defendants in this case. We have furnished a copy of the petition in *Loe* to counsel for respondent.

[11] The FTCA has long been construed to cover prisoners' allegations of improper medical care. See, *e.g.*, *United States*

The FTCA establishes comprehensive administrative and judicial remedies for injuries suffered as the result of the unlawful acts or omissions of federal officials. An injured person must pursue administrative remedies in the first instance and seek judicial relief, against the United States, only if administrative relief is not forthcoming. The Seventh Circuit's creation of a remedy based directly on the Eighth Amendment would allow injured persons to bypass the administrative remedies requirement (and statute of limitations)[12] imposed by the FTCA. See 28 U.S.C. 2675(a), 2401(b). This might create litigation that is needless, because the administrative process could have afforded full relief. In addition, the Seventh Circuit's holding would frustrate the congressional decision to remunerate the victims of at least some official misconduct out of the public fisc rather than out of the pockets of the individual officials.[13] In sum,

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v. *Muniz*, 374 U.S. 150, 151-152 (1963); *Brown* v. *United States*, 374 F. Supp. 723 (E.D. Ark. 1974). Moreover, since 1974 the FTCA also has provided recovery for many of the intentional torts of "investigative or law enforcement officers." See 28 U.S.C. 2680(h); S. Rep. No. 93-588, 93d Cong., 1st Sess. (1973). Correctional officers and other employees of the Bureau of Prisons fall within the definition of "investigative or law enforcement officers." See *Torres* v. *Taylor*, *supra*, 456 F. Supp. at 953-954; 18 U.S.C. 3050.

[12] See *Kubrick* v. *United States*, 581 F.2d 1092 (3d Cir. 1978), petition for cert. pending, No. 78-1014.

[13] Although it furnishes legal defense, the federal government does not indemnify its employees against personal judgments such as those resulting from the *Bivens*-type actions at issue here. See *Hernandez* v. *Lattimore*, *supra*, 454 F. Supp. at 765.

[Footnote continued on page 13]

extension of the *Bivens* rationale to claims covered by the FTCA would "allow [Congress's] careful and thorough remedial scheme to be circumvented by artful pleading." *Brown* v. *General Services Administration*, *supra*, 425 U.S. at 833.

b. A related question involving the application and scope of *Bivens* is before this Court in *Davis* v. *Passman*, *supra*. That case involves a *Bivens*-type suit for damages arising out of alleged gender-based employment discrimination by a then member of Congress. The Fifth Circuit held that, in light of the

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[13] [Continued]

With regard to certain kinds of claims, the FTCA explicitly prohibits the award of damages against federal officials if the United States intervenes as a defendant. 28 U.S.C. 2679(b). Another provision states that a judgment in any FTCA action "shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim," 28 U.S.C. 2676. These provisions, insofar as they indicate a legislative design under which the liability of the United States is exclusive, strongly militate against the implication of an additional federal remedy. It might be argued in response that this exclusivity pertains only to cases in which the United States is a defendant, thus leaving to plaintiffs the option of proceeding against the individual employees. On this reading, the limits to the rule of exclusive liability support the Seventh Circuit's decision here. That reading is incorrect, however. The exclusivity rules of the FTCA preclude awards of damages based on state law or explicit federal statutes. Recourse to such well-established remedies is properly extinguished only by clear legislative command. The question here, however, is whether the court should create a right of action that is not founded on state law or any federal statute. The limits on the rule of exclusivity contained in the FTCA do not assist respondent in this respect. Rather, as we emphasize in the text, because Congress has created one remedy the courts should not create another, redundant one.

nature of the rights created by the Due Process Clause of the Fifth Amendment and the limits on the statutory remedies for employment discrimination, an implied constitutional right of action for damages would be inappropriate in that case. 571 F.2d at 798-800. *Davis* v. *Passman* does not present the question which this case involves: whether an existing adequate federal remedy was intended by Congress to be exclusive or otherwise should preclude judicial creation of a constitutional right of action for money damages. Nonetheless, because *Davis* v. *Passman* may address whether it is appropriate to extend implied constitutional remedies to situations in which Congress may have indicated that there be no federal damages remedy, and because that question is closely related to the issue raised by this case, the Court may wish to defer disposition of this petition pending its decision in *Davis* v. *Passman*.

2. The court of appeals also concluded that the Indiana survival and wrongful death provisions are inapplicable to this case. Although Indiana law provides that almost all rights of action survive the victim's death, and in most cases Indiana law would afford substantial recovery for personal injuries causing death,[14] the court nonetheless concluded that the

[14] Indiana limits (but does not abate) recovery for wrongful death only where, as here, the decedent is not survived by any close relatives. See note 6, *supra*. In that regard, the Indiana statute is more generous than the Louisiana provisions approved by this Court in *Robertson* v. *Wegmann*, 436 U.S. 584 (1978), as governing survival of civil rights actions. In declining to create a general federal rule, the Court noted that "[t]he goal of compensating those injured by a deprivation of rights provides no basis for requiring compensation of one who is merely suing as the executor of the deceased's estate." *Id.* at 592.

Indiana statutes "would frustrate the federal policies underlying *Bivens*" in this case because respondent's recovery would be limited to hospital, medical, funeral, and estate administration expenses (App. A, *infra*, 9a). See note 6, *supra*. Therefore, the court, eschewing a case-by-case approach, fashioned a broad federal rule: "whenever the relevant state survival statute would abate a *Bivens*-type action brought against defendants whose conduct results in death, the federal common law allows survival of the action" (App. A, *infra*, 13a). In so holding, the Seventh Circuit answered a question that this Court reserved in *Robertson* v. *Wegmann*, 436 U.S. 584, 592, 594 (1978).

Rights of action based on violations of the Constitution serve two purposes: compensation of the victims and deterrence of future wrongdoing. As the court of appeals acknowledged (App. A, *infra*, 10a), recovery of damages by respondent will do nothing to "compensate" Jones, who is dead. See *Robertson* v. *Wegmann*, *supra*, 436 U.S. at 592. The recovery would simply be a windfall to respondent, who was not dependent on Jones in any way. Cf. *Bangor Punta Operations, Inc.* v. *Bangor & Aroostook R.R.*, 417 U.S. 703 (1974) (windfall recoveries are disfavored). Moreover, application of the Indiana rule of survivorship would not erode the deterrent force of damages actions. As we have pointed out (note 6, *supra*), the

Indiana rule allows full recovery in almost every case after the victim's death. It limits recovery (and never precludes recovery) only when the victim has no wife, dependent children, or dependent relatives. It limits recovery, in other words, only in those cases where recovery is most likely to be a windfall. The application of this limit leaves the deterrence of damages actions unaffected; it is most unlikely that any of the federal officials who are defendants here acted improperly in the hope that Jones had no dependents and thus would not be able to recover.[15] The incremental deterrence that might be achieved by allowing recovery in cases such as this, even at the expense of the policy against windfalls, is not sufficient to justify the creation of a federal rule to supplant Indiana's rule.

Here, as in *Robertson*, the state rule cannot be considered inconsistent with federal objectives "merely because the statute causes the plaintiff to lose the litigation. If success * * * were the only benchmark, there would be no reason at all to look to state law, for the appropriate rule would then always be the one favoring the plaintiff, and its source would be essentially irrelevant. But [42 U.S.C.] § 1988 quite clearly instructs us to refer to state statutes; it does not say that state law is to be accepted or rejected based solely on which side is advantaged thereby"

[15] See *Robertson* v. *Wegmann, supra,* 436 U.S. at 592. Cf. *United States* v. *Janis,* 428 U.S. 433 (1976).

(436 U.S. at 593).[16] The Seventh Circuit has made the choice of law turn solely on "who is advantaged thereby," and this Court should review that decision.

[16] Although *Robertson* involved the construction of 42 U.S.C. 1988, which made state law controlling in some procedural matters in suits under 42 U.S.C. 1983 unless the state law frustrated federal policy, the same principles should apply in this case. Section 1983 simply authorizes federal courts to enforce provisions of the Constitution. If it is ordinarily appropriate to refer to state law in Section 1983 cases on matters such as statutes of limitations, survivorship, and so on, then it is equally appropriate to refer to state law in constitutional suits against federal officers, at least so long as no federal statute calls for a different result. This Court has emphasized the equivalence of *Bivens*-type actions and suits under Section 1983 (see *Butz* v. *Economou*, No. 76-709 (June 29, 1978)), and many federal courts have held that state law rules on limitations and similar matters should be used in *Bivens* actions. See, *e.g., Beard* v. *Robinson*, 563 F.2d 331 (7th Cir. 1977); *Regan* v. *Sullivan*, 557 F.2d 300, 303-307 (2d Cir. 1977); *D[illegible] Malherbe* v. *International Union of Elevator Constructors*, [illegible] F. Supp. 1335 (N.D. Cal. 1978).

CONCLUSION

The Court should defer disposition of this petition until it has decided *Davis* v. *Passman*. If it elects not to defer disposition, it should grant the petition.

Respectfully submitted.

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FEBRUARY 1979

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 77-1334

MRS. MARIE GREEN, Administratrix of the Estate of Joseph Jones, Jr. (a/k/a Roscoe Simmons), and next-of-kin of Joseph Jones, Jr., PLAINTIFF-APPELLANT

v.

NORMAN A. CARLSON, Director, Federal Bureau of Prisons, ET AL., DEFENDANTS-APPELLEES

Appeal from the United States District Court
for the Southern District of Indiana
Terre Haute Division

No. TH 76-93-C—JAMES E. NOLAND, *Judge*

Argued November 3, 1977—Decided August 3, 1978

Before FAIRCHILD, *Chief Judge*, and SWYGERT, *Circuit Judge*, and GRANT, *Senior District Judge*.[1]

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[1] The Honorable Robert A. Grant, United States Senior District Judge for the Northern District of Indiana, sitting by designation.

SWYGERT, *Circuit Judge.* The principal issue presented on appeal is whether a claim against federal officials for damages based on alleged constitutional violations resulting in death survives for the benefit of the decedent's estate. In dismissing the complaint for lack of subject matter jurisdiction, the district court held that survival of this federal claim is governed by the Indiana survival statute. We do not agree and therefore reverse.

I

To place the issue in context, it is necessary to recite the facts as alleged in the complaint.[2] At the time of his death on August 15, 1975, Joseph Jones, Jr. was a prisoner in the federal penitentiary at Terre Haute, Indiana, serving a ten-year sentence for bank robbery. He had been diagnosed as a chronic asthmatic in 1972 when he entered the federal prison system. In July 1975, the prisoner's asthmatic condition required hospitalization for eight days at St. Anthony's Hospital in Terre Haute. Despite the recommendation of the treating physician at St. Anthony's that he be transferred to a penitentiary in a more favorable climate, Jones was returned to the Terre Haute prison. There he was not given proper medication and did not receive the steroid treatments ordered by the physician at St. Anthony's.

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[2] Because this is an appeal from the dismissal of the complaint, the allegations must be taken as true.

On August 15 Jones was admitted to the prison hospital with an asthmatic attack. Although he was in serious condition for some eight hours, no doctor saw him because none was on duty and none was called in. It was further alleged that defendant Dr. Benjamin De Garcia, the chief medical officer directly responsible for the prison medical services, did not provide any emergency procedure for those times when a physician was not present. As time went on Jones became more agitated and his breathing became more difficult. Although Jones' condition was serious, defendant Medical Training Assistant William Walters, a non-licensed nurse then in charge of the hospital, deserted Jones for a time to dispense medication elsewhere in the hospital. On his return to Jones, Walters brought a respirator and attempted to use it despite the fact that Walters had been notified two weeks earlier that the respirator was broken. After Jones pulled away from the respirator and told Walters that the machine was making his breathing worse, Walters administered two injections of Thorazine, a drug contraindicated for one suffering an asthmatic attack. A half-hour after the second injection Jones suffered a respiratory arrest. Walters and Staff Officer Emmett Barry brought emergency equipment to administer an electric jolt to Jones, but neither man knew how to operate the machine. Jones was then removed to St. Francis Hospital in Terre Haute; upon arrival he was pronounced dead.

The plaintiff, Marie Green, filed this action as administratrix of the estate of her deceased son. Her complaint alleged that he died as the result of medical care so inappropriate as to evidence intentional maltreatment, and that the defendants' acts violated the Due Process Clause and the equal protection component of the Fifth Amendment in addition to the Eighth Amendment's prohibition against cruel and unusual punishment. Several officials and employees of the Federal Bureau of Prisons as well as the Joint Commission of Accreditation of Hospitals were named as defendants. Jurisdiction was invoked pursuant to 28 U.S.C. § 1331. Plaintiff asked for $1,500,000 in actual damages and $500,000 in punitive damages.

Pursuant to motions filed by the defendants the district court dismissed the complaint for lack of subject matter jurisdiction. The court held that the plaintiff could not satisfy the $10,000 jurisdictional requirement of 28 U.S.C. § 1331 because of the limitations on recoverable damages under the Indiana wrongful death and survival statutes.[3]

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[3] In dismissing the complaint, the trial judge concluded that the Indiana wrongful death and survival statutes were the "sole mechanisms" by which Mrs. Jones as the personal representative of her son's estate could maintain an action for damages. The judge reasoned:

> The plaintiff obviously is attempting to avoid the limitations on recovery inherent in the statutory remedy and characterizes this as an action "of the Estate of one who was deprived of fundamental human rights suing for justice in the form of money damages." The Court does not believe that such an action exists other than as set out in the wrongful death and survival statutes.
>
> * * * *
>
> At common law the plaintiff herein could not have maintained an action such as this on behalf of the decedent's estate since such actions did not generally survive the injured person's death. It is apparent the plaintiff seeks the benefit of the wrongful death statute to provide her with standing to bring this action on behalf of Jones' estate.

The trial court recognized that an action for damages may be brought for a violation of a right guaranteed by the Constitution. *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971). The court further recognized that under the authority of *Estelle* v. *Gamble*, 429 U.S. 9 (1976), Jones could have maintained this *Bivens*-type action against the defendants if he had survived the alleged wrongs. The court, however, dismissed plaintiff's complaint because, in its view, survival of Jones' federal claim was governed by state law.[4]

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[4] If, as the district court held, the plaintiff were confined to the provisions of the Indiana wrongful death statute, the amount of recovery could not reach the $10,000 requirement of 28 U.S.C. § 1331. That statute, Ind. Code § 34-1-1-2 (Burns ed. 1970), provides that when a person's death is caused by the wrongful act or omission of another, the personal representative of the decedent may maintain an action against the wrongdoer if the injured party might have maintained an action for the wrongful act had he lived. Damages are awarded to the widow, widower, dependent children, or dependent next-of-kin. The statute also provides that if the decedent leaves no such persons surviving him, damages are limited to the reasonable value of the hospital, medical and surgical services, funeral expenses, and costs and expenses of administration. Joseph Jones, Jr. left neither widow nor dependent

II

The Supreme Court recently addressed the issue of survival of a federal claim in *Robertson* v. *Wegmann*, 98 S.Ct. 1991 (1978). In that case, Clay Shaw filed an action under 42 U.S.C. § 1983 against several defendants for bad faith prosecution. He died several months before the trial was set. After the executor of Shaw's estate was substituted as plaintiff, various defendants moved for dismissal of the action on the ground that the cause abated with Shaw's death. The district court thus had to determine whether the survival of the action was governed by state or federal law.

Because the action was brought under section 1983, the trial court referred to 42 U.S.C. § 1988 which provides that when federal law is deficient as to a suitable remedy, the relevant state law shall govern "so far as the same is not inconsistent with the Constitution and laws of the United States." [5]

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children or next-of-kin surviving him. Because Jones was in federal prison during this period, the listed items patently could not total $10,000.

It is important, however, to characterize plaintiff's complaint properly. The district court erred in its characterization. The plaintiff is suing neither for deprivation of another's constitutional rights nor on the independent, statutorily created cause of action such as an action for wrongful death. Rather, she is asserting her son's cause of action as the administratrix of his estate.

[5] 42 U.S.C. § 1988 provides:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, *so far as the same is not inconsistent with the Constitution and laws of the United States*, shall be extended to and govern the said courts in the trial and disposition of the cause. (emphasis added)

The federal civil rights laws do not provide for survival. Under Louisiana law the action would abate since no person with the requisite relationship to Shaw survived him. Both the district court and the Fifth Circuit held Louisiana law to be inconsistent with the broad remedial purposes of the Civil Rights Acts. They therefore fashioned a federal common law of survival in favor of the estate. The Supreme Court reversed.

The Court ruled that questions of inconsistency between state and federal law raised under section 1988 should be resolved by looking not only at the relevant federal statutes and constitutional provisions, but also at the policies expressed in them. The Court recognized two policies underlying a section 1983 cause of action: "[1] compensation of persons injured by deprivation of federal rights and [2] prevention of abuses of power by those acting under color of state law." 98 S.Ct. at 1995. Because of the peculiar facts of the case, the Court found that ap-

plication of the state survivorship statute would not have an "independent adverse effect" on those policies.[6] The Court also noted that the state survivorship law neither excluded survival of all tort actions nor significantly restricted the types of actions that survive. The Court held the Louisiana statute not inconsistent with the underlying policies of section 1983 and therefore applicable.

Because *Robertson* dealt with a claim under section 1983, the Court was required to apply section 1988 and adopt Louisiana law unless that law was found to be inconsistent with "the Constitution and laws of the United States," that is, the policies underlying the Civil Rights Acts. The Court found no inconsistency. Because the instant action involves a *Bivens*-type claim, section 1988 has no statutory effect. Nonetheless, because actions brought under the Civil Rights Acts and those of the *Bivens*-type are conceptually identical and further the same policies, courts have frequently looked to the Civil Rights Acts and their decisional gloss for guidance in filling the

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[6] The goal of compensating those injured by a deprivation of rights provides no basis for requiring compensation of one who is merely suing as the executor of the deceased's estate. And, given that most Louisiana actions survive the plaintiff's death, the fact that a particular action might abate surely would not adversely affect § 1983's role in preventing official illegality, at least in situations in which there is no claim that the illegality caused the plaintiff's death.

98 S.Ct. at 1996 (footnote omitted).

gaps left open in *Bivens*-type actions.[7] Accordingly, an analysis similar to that developed in *Robertson* should be used in the case at bar.

We first note the absence of any applicable federal survivorship rule. Consequently, we turn to "the common law, as modified and changed by the Constitution and statutes of the [forum] State. . . ." Indiana does have a survivorship statute, but its application to this federal claim would leave the plaintiff without a remedy.[8] In determining whether application of Indiana's law is "inconsistent with the Constitution and laws of the United States," we must consider whether application of that law would frustrate the federal policies underlying *Bivens*. We hold that it would.

Bivens recognized the existence of a federal substantive right based directly on the Fourth Amendment and held that the courts have power to create a damage remedy for injuries suffered as a result of

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[7] *See Beard* v. *Robinson*, 563 F.2d 331 (7th Cir. 1977); *Paton* v. *LaPrade*, 524 F.2d 862 (3d Cir. 1975); *Mark* v. *Groff*, 521 F.2d 1376 (9th Cir. 1975).

[8] Under the Indiana survival statute, Ind. Code § 34-1-1-1 (Burns ed. 1970), a decedent's personal representative may maintain an action only if the decedent "receive[d] personal injuries caused by the wrongful act or omission of another and thereafter die[d] from causes *other* than said personal injuries so received." (emphasis added) Although Joseph Jones, Jr. died allegedly as the result of physical maltreatment, his death was not the result from causes other than the alleged wrongdoing. Thus the only cause of action for personal injury permitted to survive under Indiana law encompasses a factual situation different from that alleged in this case.

the violation of that right by federal officials. Numerous courts have extended the rationale of *Bivens* to other types of claims.[9] Such an extension should be made discreetly, but when appropriate courts should do so. The federal policies of compensation and deterrence which underlie section 1983, noted by the Court in *Robertson*, are equally applicable here. Because Jones, Jr.'s estate is suing, the policy of compensating the injured person would not be thwarted by abatement. It is the second concern, prevention of abuse of power by officials, which distinguishes this case from *Robertson*. Unlike Shaw, Jones, Jr. is alleged to have died as a *result* of the deprivation of his civil rights. In *Robertson* the Court expressly intimated no view about whether abatement based on state law would be allowed in that situation. We hold that the "inconsistency" which would be created by application of the state law necessitates the creation of a federal common law of survival in a case such as that before us.

The question whether a federal action survives was recently considered by this court in *Beard* v. *Robinson*, 563 F.2d 331 (7th Cir. 1977). Beard's mother, as

[9] *See Briggs* v. *Goodwin*, 569 F.2d 10, 17 n. 8 (D.C. Cir. 1977), and *Jacobson* v. *Tahoe Regional Planning Agency*, 566 F.2d 1353, 1364 n. 23 (9th Cir. 1977), for a listing of cases in which courts either extended *Bivens* to cover violations of other rights or indicated they would look favorably on such an extension. Several courts have rejected extension, although only in one case was the plaintiff attempting to recover damages from federal officials. *See Davidson* v. *Kane*, 337 F. Supp. 922, 925 (E.D. Va. 1972) (no extension to Fifth Amendment due process claim).

administratrix for her son's estate, filed a suit for damages in federal court alleging that a Chicago policeman and several FBI agents had murdered her son. The claim against the policeman was brought under the Civil Rights Acts, 42 U.S.C. §§ 1981 *et seq.*, while the claim against the FBI agents was brought pursuant to *Bivens*. Noting that neither the Civil Rights Acts nor the Supreme Court's decision in *Bivens* addressed the issues of abatement or survival of such actions, this court said that "most courts that have considered the question of the survival of federal civil rights claims have looked to state law, either on the authority of 42 U.S.C. § 1988 or simply because reference to state law obviated the need to fashion an independent federal common law rule." *Id.* at 333. As to the claim under the Civil Rights Acts, this court, pursuant to the authority of section 1988, borrowed the Illinois Survival Act [10] because that statute was deemed completely consistent with the Constitution and the laws of the United States. As to the plaintiff's *Bivens* claim we said, "[T]he adoption of

[10] The Illinois Survival Act, Ill. Rev. Stat. ch. 3, § 339, provides:

> In addition to the actions which survive by the common law, the following also survive: actions of replevin, actions to recover damages for an injury to the person (except slander and libel), actions to recover damages for an injury to real or personal property or for the detention or conversion of personal property, actions against officers for misfeasance, malfeasance, or nonfeasance of themselves or their deputies, actions for fraud or deceit, and actions provided in Section 14 of Article VI of "An Act relating to alcoholic liquors," approved January 31, 1934, as amended.

state law likewise seems warranted since it is consistent with the federal policies underlying *Bivens*." *Id.*

The same underlying policies dictate our decision here. It would be anomalous as well as ironic to hold that Jones, Jr. could have sought redress for violation of his constitutional rights had he survived the alleged wrongdoing, but because the wrongdoing caused his death, the law is impotent to provide a remedy to benefit his estate. Such a holding would not only fail to effectuate the policy of allowing complete vindication of constitutional rights; it would subvert that policy. Although the Fifth Circuit in *Brazier* v. *Cherry*, 293 F.2d 401 (5th Cir. 1961), was concerned with survival of an action brought under the civil rights statutes (and not a *Bivens*-type action), Judge Brown's language is apposite:

> [I]t defies history to conclude that Congress purposely meant to assure the living freedom from such unconstitutional deprivations, but that, with like precision, it meant to withdraw the protection of civil rights statutes against the peril of death. The policy of the law and the legislative aim was certainly to protect the security of life and limb as well as property against these actions. Violent injury that would kill was not less prohibited than violence which would cripple.

293 F.2d at 404. Allowing recovery for injury but denying relief for the ultimate injury—death—would mean that it would be more advantageous for a tortfeasor to kill rather than to injure. Surely this cannot be the intent of the law.

The essentiality of the survival of civil rights claims for complete vindication of constitutional rights is buttressed by the need for uniform treatment of those claims, at least when they are against federal officials.[11] As this very case illustrates, uniformity cannot be achieved if courts are limited to applicable state law. Here the relevant Indiana statute would not permit survival of the claim, while in *Beard* the Illinois statute permitted survival of the *Bivens* action. The liability of federal agents for violation of constitutional rights should not depend upon where the violation occurred. It should also be noted that because federal prison authorities decide the prison where a prisoner is incarcerated, those authorities in a sense choose the state in which the wrong occurs. This is an additional reason why the survivorship law of the particular state should not cut off recovery. In sum, we hold that whenever the relevant state survival statute would abate a *Bivens*-type action brought against defendants whose conduct results in death, the federal common law allows survival of the action.

III

The federal defendants challenge the sufficiency of the complaint to state a claim for damages under the

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[11] For a discussion of the desirability of uniformity, *see* Note, *The Federal Common Law*, 82 Harv. L. Rev. 1512, 1523-24, 1529-31 (1969). In *Robertson* the Court rejected this argument in relation to section 1983 claims, 98 S.Ct. at 1997 n. 11, by relying heavily upon congressional guidance through section 1988. However, since that section has no statutory effect on *Bivens*-type actions, and we find that this is an area of law in which courts must be free to develop federal common law, *Robertson's* rejection of the desirability of uniformity has no bearing on the case here.

Constitution. They contend that plaintiff's allegations merely assert a medical malpractice claim against the individual defendants cognizable in the state courts. We note that state law would apply to a claim of medical malpractice by federal employees. However, if the suit were against the federal government, it would be filed in federal court pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 *et seq.*, not in state court. *United States* v. *Muniz*, 374 U.S. 150, 162 (1963). Of significance also is the fact that the Tort Claims Act only applies to claims for injuries suffered as the result of the negligence of government employees and not for intentional torts, 28 U.S.C. § 2680(h). Plaintiff's claim here alleges serious deprivation of constitutional rights, not mere negligence. As the district court stated, "[G]iven the serious allegations of the complaint herein if Jones were alive today he could properly maintain an action under § 1331 alleging a denial of proper medical treatment. *Estelle* v. *Gamble* [429 U.S. 99 (1976)]." In so ruling the district court could properly consider the plaintiff's allegations that Jones, Jr. was denied medical treatment "so clearly inadequate as to amount to a refusal to provide essential care, so inappropriate as to evidence intentional maltreatment causing death."

We agree with the district court's appraisal. In *Estelle* the Supreme Court recognized that

> [a]n inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst

> cases, such a failure may actually produce physical "torture or a lingering death," . . . the evils of most immediate concern to the drafters of the [Eighth] Amendment.

429 U.S. at 103. The Court concluded:

> [D]eliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain," . . . proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed.

429 U.S. at 104-05 (citations omitted). Under the criteria delineated in *Estelle*, the alleged conduct of the federal defendants rises to the level of constitutional violations.

The status of the Joint Commission on Accreditation of Hospitals as well as its exact participation in the alleged events are unclear. Neither the allegations of the complaint nor counsels' arguments are helpful. Because we are left in the dark on this phase of the case, we decline to rule on the issue of whether the Commission should have been dismissed as a defendant under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

IV

Preliminary to dismissing the complaint, the district court dismissed Norman A. Carlson, the Director of the Federal Bureau of Prisons, and Robert T.

Brutshe, the Assistant Surgeon General of the United States, on the ground that they had not been personally served by summons as required by Rule 4(d)(1) of the Federal Rules of Civil Procedure. We agree with the plaintiff, in challenging the dismissal, that Rule 4(d)(1) is inapplicable. Carlson and Brutshe, non-inhabitants of the State of Indiana, were served with summons by certified mail in accordance with the provisions of Rule 4(e) and (f). Under those provisions a plaintiff may resort to state procedures for effecting service on non-resident parties, in this case Indiana Trial Rule 4.4 which provides for service by certified mail. Both defendants had contacts with Indiana sufficient to permit use of this provision and to meet the requirements of due process. Carlson, as Director of the Federal Bureau of Prisons, is responsible for the management of the federal prison system. Brutshe, as Assistant Surgeon General of the United States, is responsible for monitoring the medical services at the Terre Haute prison. Accordingly, the service of process upon Carlson and Brutshe by certified mail was proper.

The judgment of the district court is reversed except as to the dismissal of defendant C. L. Benson.[12] The cause is remanded for further proceedings.

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[12] Plaintiff does not raise the issue of the dismissal of defendant Benson, the warden of the Terre Haute prison at the time of Joseph Jones, Jr.'s death. He was not personally served with summons; instead, his successor in office was served by the marshal. Under the circumstances, the dismissal of defendant Benson was proper.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

August 3, 1978

Before

HON. THOMAS E. FAIRCHILD, *Chief Judge*

HON. LUTHER M. SWYGERT, *Circuit Judge*

HON. ROBERT A. GRANT, *Senior District Judge**

No. 77-1334

MRS. MARIE GREEN, Administratrix of the Estate of
JOSEPH JONES, JR., PLAINTIFF-APPELLANT

vs.

NORMAN CARLSON, Director, Federal Bureau of
Prisons, ET AL., DEFENDANTS-APPELLEES

Appeal from the United States District Court
for the Southern District of Indiana
Terre Haute Division

No. TH 76-93-C—JAMES E. NOLAND, *Judge*

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* The Honorable Robert A. Grant, United States Senior District Judge for the Northern District of Indiana, sitting by designation.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Terre Haute Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, except as to the dismissal of defendant C. L. Benson, and REMANDED, in accordance with the opinion of this court filed this date.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

November 24, 1978

Before

HON. THOMAS E. FAIRCHILD, *Chief Judge*

HON. LUTHER M. SWYGERT, *Circuit Judge*

HON. ROBERT A. GRANT, *Senior District Judge**

No. 77-1334

MRS. MARIE GREEN, Administratrix of the Estate of JOSEPH JONES, JR., PLAINTIFF-APPELLANT

vs.

NORMAN CARLSON, Director, Federal Bureau of Prisons, ET AL., DEFENDANTS-APPELLEES

Appeal from the United States District Court
for the Southern District of Indiana
Terre Haute Division

No. TH 76-93-C—JAMES E. NOLAND, *Judge*

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-

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* Hon. Robert A. Grant, Senior District Judge for the Northern District of Indiana, is sitting by designation.

entitled cause by counsel for the federal defendants-appellees, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

No. TH 76-93-C

MRS. MARIE GREEN, Administratrix of the estate of JOSEPH JONES, JR., PLAINTIFF

vs.

NORMAN CARLSON, Director, Federal Bureau of Prisons, ET AL, DEFENDANTS

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS AND ENTRY OF JUDGMENT THEREON

This cause comes before the Court upon the motions of various of the defendants herein seeking the Court to dismiss the plaintiff's action for lack of subject matter jurisdiction, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, for insufficient service of process as to certain of the defendants, pursuant to Rules 12(b)(4) and 12(b)(5) of the Federal Rules of Civil Procedure, and for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Whereupon the Court, having examined and considered the above motions and briefs filed in support

thereof and in opposition thereto, and now being duly advised in the premises, the Court finds as follows:

1. Defendants Norman A. Carlson, Charles L. Benson, and Robert L. Brutsche are entitled to be DISMISSED from this action for failure to be properly served with process herein.

2. This entire cause should be DISMISSED for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that defendants Carlson, Benson and Brutsche are hereby DISMISSED from this action and the plaintiff's complaint against all defendants herein is hereby DISMISSED for lack of subject matter jurisdiction, JUDGMENT is hereby entered in favor of the defendants herein.

DATED this 10th day of January, 1977.

/s/ James E. Noland
JAMES E. NOLAND
U. S. District Judge

MEMORANDUM ENTRY

The plaintiff has filed this action as Administratrix of the estate of Joseph Jones, Jr. seeking monetary relief from the defendants by reason of Jones' death while he was a federal prisoner incarcerated in the United States Penitentiary at Terre Haute, Indiana.

Named as defendants herein include six officials, officers, and employees of the Bureau of Prisons who have been sued in their official and individual capacities. Also named as a defendant herein is the Joint Commission on Accreditation of Hospitals, which allegedly is responsible for inspecting and accrediting the hospital at the Terre Haute Penitentiary. The plaintiff asserts that Jones died as a result of improper medical treatment rising to the level of a constitutional violation on the part of prison officials. Subject matter jurisdiction is invoked pursuant to 28 U.S.C. § 1331.

The first issue for resolution by the Court concerns the motion to dismiss filed by defendants Carlson, Benson, and Brutsche seeking dismissal herein for the plaintiff's failure to properly serve them with process in accordance with Rule 4 of the Federal Rules of Civil Procedure. From the Court records it appears that defendants Carlson and Brutsche were only served with process by certified mail and that defendant Benson was not served at all. In light of the fact that the plaintiff is attempting to recover damages from each defendant herein personally the substituted service provisions of Rule 4(d)(5) of the Federal Rules of Civil Procedure are not applicable. *Griffith* v. *Nixon*, 518 F.2d 1195 (2nd Cir. 1975); *Green* v. *Laird*, 357 F. Supp. 227 (N.D. Ill. 1973). Therefore, such defendants are entitled to a dismissal from this action until such time as they are personally served with process in a proper manner as provided by Rule 4(d) of the Federal Rules of Civil Procedure.

Were it not for the lack of subject matter jurisdiction herein the above described defects in service could easily be cured and this action could proceed accordingly. However, the Court believes the jurisdictional amount requirement of 28 U.S.C. § 1331 cannot be satisfied herein and, therefore, this entire action should be DISMISSED.

Accepting as true the plaintiff's allegations that Jones died as a result of a wanton and intentional denial of adequate medical care by the prison officials named as defendants herein, the Court initially recognizes that "deliberate indifference to a prisoner's serious illness or injury" can amount to cruel and unusual punishment proscribed by the Eighth Amendment. *Estelle* v. *Gamble*, 45 U.S.L.W. 4023, 4025 (Nov. 30, 1976); see also *Thomas* v. *Pate*, 493 F.2d 151 (7th Cir.), *cert. denied sub nom. Thomas* v. *Cannon*, 419 U.S. 879 (1974). It is also generally accepted that a direct action based upon 38 U.S.C. § 1331 may be brought against federal officials and others acting under color of federal law for violations of an individual's constitutional rights provided the $10,000 amount in controversy requirement can be satisfied. *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

With respect to the jurisdictional amount issue herein, the Court is aware that "liberal standards" are to be used in ascertaining the existence of the necessary amount in controversy in cases brought under § 1331 alleging a constitutional denial. *Calvin* v. *Conlisk*, 520 F.2d 1, 9 (7th Cir. 1975), vacated on

other grounds, 424 U.S. 902 (1976). In light of such standard, the Court believes that given the serious allegations of the complaint herein if Jones were alive today he could properly maintain an action under § 1331 alleging a denial of proper medical treatment. *Estelle* v. *Gamble, supra.* However, since Jones has died neither leaving any dependents nor having incurred medical or burial expenses sufficient to satisfy the $10,000 requirement, it is not possible for the plaintiff herein to maintain this action under the Indiana wrongful death or survival statutes, *Ind. Ann. Stats.* §§ 34-1-1-1 - 34-1-1-2 (Burns' Code Ed.). Although the plaintiff insists in her brief that this is not an action "for pecuniary loss of support" based on any state statutes like the above, the Court believes that such statutes are the sole mechanism by which the personal representative of a decedent's estate may maintain an action for damages arising from the decedent's death. The plaintiff obviously is attempting to avoid the limitations on recovery inherent in the statutory remedy and characterizes this is an action "of the Estate of one who was deprived of fundamental human rights suing for justice in the form of money damages." The Court does not believe that such an action exists other than as set out in the wrongful death and survival statutes.

It is recognized that one person may not generally seek redress for constitutional deprivations suffered by another. *United States* v. *Raines*, 362 U.S. 17 (1960). At common law the plaintiff herein could not have maintained an action such as this on behalf

of the decedent's estate since such actions did not generally survive the injured person's death. It is apparent the plaintiff seeks the benefit of the wrongful death statute to provide her with standing to bring this action on behalf of Jones' estate, but yet she asserts such statute is not applicable to her action. The plaintiff should not be able to accept the benefits conferred by such statute without assuming the limitations imposed therein as well.

Any recovery in an action such as this is limited to the pecuniary loss of dependents and the reasonable hospital, medical, and burial expenses incurred by the decedent. Since the plaintiff makes no claim for pecuniary loss as a dependent of Jones and there were no medical or hospital expenses herein, it is apparent that the plaintiff cannot "in good faith" satisfy the jurisdictional amount requirement. To this end it is also interesting to note that in the Petition for Letters of Administration filed in Jones' Estate in the Probate Division of the Circuit Court of Cook County, Illinois, the plaintiff stated Jones' estate consisted of nothing more than a personal "cause of action" worth $500.

In light of the above, the Court concludes that it lacks subject matter jurisdiction over this cause under 28 U.S.C. § 1331. Therefore, the plaintiff's complaint is DISMISSED and JUDGMENT is entered in favor of the defendants herein.